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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/084,232	02/28/2002	Leslie Dort	A889577US	7803
7590	10/23/2003		EXAMINER	
D. Doak Horne c/o Gowlings Lafleur Henderson LLP Suite 1400 700 - 2nd Street, N.W. Calgary, AB T2P 4V5 CANADA			BROWN, MICHAEL A	
			ART UNIT	PAPER NUMBER
			3764	
			DATE MAILED: 10/23/2003	

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/084,232	Leslie Port
Examiner	Group Art Unit	
Michael Brown	3764	

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication .
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

#### Status

- Responsive to communication(s) filed on \_\_\_\_\_.
- This action is FINAL.
- Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

#### Disposition of Claims

- Claim(s) 1-7 and 9-13 is/are pending in the application.
- Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- Claim(s) \_\_\_\_\_ is/are allowed.
- Claim(s) 1-7 and 9-13 is/are rejected.
- Claim(s) \_\_\_\_\_ is/are objected to.
- Claim(s) \_\_\_\_\_ are subject to restriction or election requirement.

#### Application Papers

- See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.
- The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- The specification is objected to by the Examiner.
- The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. § 119 (a)-(d)

- Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- All  Some\*  None of the CERTIFIED copies of the priority documents have been received.
- received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
- received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_.

#### Attachment(s)

- Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_
- Interview Summary, PTO-413
- Notice of Reference(s) Cited, PTO-892
- Notice of Informal Patent Application, PTO-152
- Notice of Draftsperson's Patent Drawing Review, PTO-948
- Other \_\_\_\_\_

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## **DETAILED ACTION**

### ***Claim Rejections - 35 U.S.C. § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-3, 5-7, 9-11 and 13 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Forney.

### ***Claim Rejections - 35 U.S.C. § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 4 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Forney in view of Alvarez '734, as set forth in the previous office action, Paper No. 3.

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***Response to Arguments***

5. Applicant's arguments filed August 1, 2003 have been fully considered but they are not persuasive.

Applicant argues claim 1, of the present invention recites that the flange is adapted to be inserted into the user's mouth. Applicant also argues that in Forney the flange is adapted to contact the user's face and not be inserted into the mouth. However, since claims 1-7 and 9-13 are product claims, no patentable weight was given to what any structural element is adapted to do. Applicant argues that the Forney does not teach a tongue retaining device having a flange and a protrusion formed as a unitary body. However, the flange is attached to the housing. Thus, making the device a unitary body. Applicant argues that in claim 6, "or alveolar ridges if the teeth are absent. However, the alveolar ridges are not positively claimed in claim 6. Thus, no patentable weight was given to the alveolar ridges. One thing that must be pointed out here is no portion of the human body can be claimed. Applicant argues that Forney does not disclose a bulb on a unitary body. However, Forney discloses a bulb 20 and the body is a unitary body because it is attached together. Applicant has not claimed any novel means of attaching the body together. So if the body is pressed fitted together or glued together, either way it is a unitary body.

Applicant argues that Forney does not teach the method recited in claim 13. Applicant argues that Forney does not teach a tongue retaining device having a flange adapted to be received between a person's lips and teeth. However, in claim 13, the method step of positioning the tongue retention device between the user's lips and teeth is recited, the flange being inserted into

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the mouth is not recited. Forney discloses in figure 4 positioning the tongue retention device between the user's lips and teeth. Applicant argues that neither Forney or Alvarez teaches the flange adapted to be inserted into the user's mouth. However, as set forth above, no patentable weight was given to the flange being inserted into the user's mouth. Alvarez was used as a modifier to provide a specific type of material to make the device. Applicant argues that in respect to claims 2 and 7, the device taught by Forney is not a made of a pliable material and a unitary body. However, Alvarez was used to set forth the type of material recited in the claims of the present invention and the body is unitary because it is connected together.

### *Conclusion*

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is (703) 308-2682.

M. Brown  
October 20, 2003



**MICHAEL A. BROWN  
PRIMARY EXAMINER**